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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
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No. 43037-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN THE MATTER OF:

Anthony F. Cota,

Appellant,

v.

Regina K. Cota,

Respondent.

APPELLANT'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERRORS and ISSUES PERTAINING TO ASSIGNMENT OF ERRORS.....	1
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT.....	5
	A. Standard of Review.....	5
	B. Jurisdiction	5
	C. Postsecondary Educational Support Factors.....	6
	D. Limitation on Amount of Support.....	10
V.	CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Childers v. Childers</i> 89 Wn. 2d 592, 575 P.2d 201 (1978).....	5, 7, 9
<i>Esteb v. Esteb</i> 138 Wash. 174, 244 P.2d 264, 246, P.27, 47 A.L.R. 110 (1926).....	7
<i>Gimlett v. Gimlett</i> 95 Wn. 2d 669, 703, 629 P.2d 450 (1981).....	5
<i>Golay v. Golay</i> 35 Wn. 2d 122, 123-124, 210 P.2d 1022 (1949).....	7
<i>In Re Marriage of Schellenberger</i> 80 Wn. App 71, 84, 906 P.2d 968 (1995).....	10
 STATUTES	
RCW 26.09.170(3).....	5
RCW 26.19.090(2).....	7,11
RCW 26.19.065(1).....	10,11

I. INTRODUCTION

This issue before the court is whether the court had jurisdiction to award postsecondary educational support for the parties' 19 year old child and, if so, how much, should be paid.

II. ASSIGNMENTS OF ERRORS and ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

Under Washington Law, was it error for the court to find that the court had jurisdiction to award postsecondary support for a child if the motion to establish postsecondary support was brought after the child graduated from high school and turned 18 years of age?

Under Washington Law, was it error to order postsecondary support to be paid by a parent when that parent did not graduate from high school, no information was provided regarding the child's aptitude for college, the child's financial resources are unknown, limited information is provided about the cost of college, and the parent's financial resources do not allow for him to pay even his basic expenses?

Under Washington Law, was it error for the court to order a parent to pay college expenses that are in excess of 45% of a parent's net income after adding in that parent's current child support obligation?

III. STATEMENT OF THE CASE

The parties, Anthony Cota, hereinafter referred to as “Anthony”, and Regina Evans, hereinafter referred to as “Regina”, have two children who, at the time of the Commissioner’s ruling regarding modifying support and awarding postsecondary educational support, were 16 and 19 years of age, respectively. CP 298, CP 204. The parties were divorced in 2006 and entered an agreed order of child support on November 3, 2006. CP 113-126. Regina was earning \$10,938 and Anthony was earning \$3,761 at that time. CP 114, CP 115. Anthony was required to pay \$759.99 child support to Regina. CP 116. The parties also agreed, based on their financial circumstances at that time, to pay for the children’s college expenses in proportion to their incomes with a cap of \$1,500 per year/per child for Anthony and \$4,500 per year/per child for Regina. CP 117. The section relating to termination of support and postsecondary education stated as follows:

- 3.13 Support shall be paid until the children reach the age of 18, or as long as the children remain(s) enrolled in high school, whichever occurs last, except as otherwise provided below in Paragraph 3.14.

Father shall continue to pay child support for both children through the age of 23 provided that both children attend a postsecondary educational institution.

- 3.14 The parties shall pay their pro rata shares of the children’s postsecondary educational expenses including, but not limited to, tuition, fees, books, room and board. Father’s portion is due directly to each child’s postsecondary educational institution is due no later than September 1st of

each year in the amount of \$1,500 per child for Sarah Annamarie and Kimberly. Mother's portion for each child shall not exceed \$4,500 per year per child.

CP 117.

Regina moved the court to modify the order of child support in 2009 based on her reduced income and the court entered a modified order of child support on February 18, 2010. CP 125-139. The parties' net incomes were determined to be \$2,919 for Regina and \$3,405.36 for Anthony. CP 127. Child Support was modified to \$929.10 per month. CP 128. The language relating to termination of support and postsecondary educational support was modified to state as follows:

- 3.13 Support shall be paid until the children turn 18 or until the children graduate from high school, whichever occurs last, except as set forth in Paragraph 3.14 below.
- 3.14 Postsecondary support determination is premature and is reserved for future determination.

CP 129.

On August 22, 2011, Anthony brought a motion to modify child support based on his reduced income. CP 160. In Regina's Response to the Petition she requested that postsecondary educational support be established. CP 184. The child, by that date, had already graduated from high school and turned 18 years of age. CP 184. The court heard the requests and modified the child support for the one child under 18

years of age to \$433.66 per month by using the incomes of the parties, Anthony at \$2,169.88 and Regina at \$2,313.94. CP 298, CP 300, CP 301. The court also ordered that Anthony pay \$8,135.07 for the school year 2011/2012 for the parties child who was apparently planning to attend Pacific Lutheran University, a private college in the State of Washington. CP 135. The only information that was provided about the cost of college were two pages attached to Regina's declaration as Exhibit "G". CP 268, CP 269. These documents consisted of Pacific Lutheran University 2011-2012 cost information breakdown and Page 1 of a student billing statement for the fall semester. CP 268, CP 269. No other information was provided about cost, the child's aptitude, the child's finances or information about alternative public schools.

A motion to revise was filed. CP 327. A hearing was held and Judge Cuthbertson ordered that the parents shall each pay their pro rata share of two-thirds of the postsecondary educational costs for the child. CP 340. A motion for reconsideration was denied. CP 360, 361.

Anthony's financial declaration showed that his basic monthly expenses were \$3,985.00. CP 170. This did not include his \$433 monthly expense for child support or the postsecondary award. CP 169. Anthony lives with no other individuals and is required to pay his own expenses. CP 168. Regina is remarried and shares expenses with her husband who makes approximately \$70,000 to \$140,000 per year.

CP 78, CP 80. Anthony does not even have a high school diploma. CP 163. Regina also does not have a college degree. CP 204.

IV. ARGUMENT

Standard of Review

The standard of review when reviewing a trial court's order on modification of child support is abuse of discretion. See Childers v. Childers, 89 Wn. 2d 592, 575 P.2d 201 (1978).

Jurisdiction

The applicable section of the statute relating to when the court loses jurisdiction to modify child support and provide for postsecondary child support states as follow:

... (3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child...

RCW 26.09.170(3)

Washington courts have held that an action must be brought before the child turns 18, unless otherwise provided in the Order, or the court loses jurisdiction to order postsecondary educational support. Gimlett v. Gimlett, 95 Wn.2d 699, 703, 629 P.2d 450 (1981).

It is undisputed in this case that the case was brought after the child turned 18 and graduated from high school. The order of child support entered on February 18, 2010, stated the following:

- 3.13 Support shall be paid until the children turn 18 or until the children graduate from high school, whichever occurs last, except as set forth in Paragraph 3.14 below.
- 3.14 Post secondary support determination is premature and is reserved for future determination.

Therefore the court had no jurisdiction to order any postsecondary educational support.

Regina's reliance on the November 3, 2006, order which states that the father will pay for college and support does not terminate until the child turns 23 years of age if still in school is misplaced. That order was superseded by the February 18, 2010, order which modified the language and terminated support when the children turned 18, or graduated from high school, whichever occurs last. Support terminated as a matter of law according to the modified order. No motion or Petition was filed prior to that date.

Postsecondary Educational Support Factors

The applicable portion of the statute relating to postsecondary educational support states as follows:

... (2) When considering whether to order support for postsecondary educational expenses, the court shall determine

whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together....

RCW 26.19.090(2)

Washington courts have long held that a parent may be required to help provide for their child's college expenses. Esteb v. Esteb, 138 Wash. 174, 244 P. 264, 246 P. 27, 47 A.L.R. 110 (1926). The courts have also long held that college expenses are not a necessity and that the parent's financial situation and ability to pay is of paramount concern when deciding whether to require payment. Golay v. Golay, 35 Wn.2d 122, 123-124, 210 P.2d 1022 (1949). The determination of when parents will be required to pay college expenses is circumstantial and fact specific. Id.; Childers v. Childers, 89 Wn.2d 592, 600, 575 P.2d 201 (1978).

The first inquiry is whether the child is dependent. It is difficult to determine the child's needs based on the limited information provided by Regina. No information was provided about the child's financial

situation. No tax returns, bank accounts or pay stubs of the child were submitted. It is unclear whether she is dependent.

Each of the factors must be examined by the court if the court determines that the child is dependent. The trial court elected not to make specific findings regarding the factors, despite being requested to do so, rather the judge made the conclusory statement that he had considered the factors (Report of Proceedings of December 2, 2011, hearing Pages 33-35) An analysis of each of the factors is as follows:

- A. The child is 19 years of age. Her needs are entirely unclear because no information was provided other than page 1 of the purported financial aid award letter which only discusses the fall, 2011, semester.
- B. These parties admittedly expected to provide for their children's college expenses when they entered into their agreed order of child support in 2006. Regina was earning \$10,938 while Anthony was earning \$3,791. Even with those significant incomes, the parties agreed to cap the amount of postsecondary educational support to \$4,500 per year for Regina and \$1,500 per year for Anthony. Both parties' incomes have dropped significantly and it is difficult to determine what their intentions would be now.
- C. The court cannot determine the child's prospects, desires, aptitudes, abilities or disabilities because no information

about the child was provided (i.e. grades, recommendation letters, test scores, etc.).

- D. Regina requests sharing expenses at a private school. The actual amount requested is unclear because the information provided was very limited. Regina did not provide information about public school alternatives. No information was provided about the child's finances.
- E. Neither of the parents have a college degree. The father only has a GED.
- F. Anthony believes the deciding factor is his standard of living and his current and future resources. Anthony earns \$2,169 per month. His expenses are \$3,985 per month. There is no extra money to pay any college expenses.

The court in Childers stated "In the 1973 act, the legislature simply allows the courts to secure for the children what they would have received from their parents except for the divorce, limited to that which is necessary for the children's and society's wellbeing and that which will not work an undue hardship on parents...". Childers at 603. Ordering Anthony to pay any postsecondary educational support will create an undue hardship.

The court in a Division I case directly addressed this issue when holding:

“Although every case must be decided on its own facts, a postsecondary education support obligation that would force the obligor parent into bankruptcy, or force that parent to liquidate the family home because he or she cannot make both the support payment and the mortgage payment will, in most cases we can presently envision, amount to a patent abuse of discretion. This is especially true where the parent also supports a minor child, and the postsecondary support obligation prevents the parent from meeting that obligation to the minor child.” In Re Schellenberger, 80 Wn. App 71, 84, 906 P.2d 968 (1995).

Although this is a Division I case, the analysis in that holding should be applied to the facts of this case.

Limitation on Amount of Support

The applicable statute relating to how much a party can be required to pay in child support is as follows:

(1) Limit at forty-five percent of a parent’s net income. Neither parent’s total child support obligation may exceed forty-five percent of net income except for good cause shown. Good cause includes but is not limited to possession of substantial wealth, children with day care expenses, special medical need, educational need, psychological need, and larger families. RCW 26.19.065(1)

The trial court did not believe that this limitation applied to college expenses. Postsecondary educational support necessarily entails supporting one’s child, thus the above limitation should apply. 45% of Anthony’s net income is \$976.45 (45% x \$2,169.88). His current support obligation for his other daughter is \$433 per month which means the most the court can order in postsecondary support per month is \$543.45 or \$6,521.35 per year.

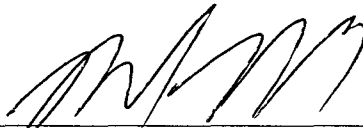
V. CONCLUSION

The court should dismiss the case based on the trial court having no jurisdiction to order postsecondary support.

In the alternative, no postsecondary support should have been ordered based on the RCW 26.19.090 factors even if the court determine, that jurisdiction exists.

At a minimum, the court should remand the case to the trial court to make specific findings regarding the factors and/or limit the amount of postsecondary support required based on Anthony's economic circumstances, RCW 26.19.065 (1) and the previously agreed cap on the amount required to be paid.

Respectfully submitted this 31st day of July, 2012.



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) **NO. 43037-1-II**
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) **AFFIDAVIT OF SERVICE**
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16 CHRISTINA K. ALLEN, being first duly sworn, on oath deposes and says that: I
17 am over the age of 18 years, am competent to be a witness herein and make this
18 affidavit of my own personal knowledge.

19 That on the 31st day of July, 2012, I sent the Appellant's Opening Brief in the
20 above-entitled matter to Respondent, Regina Evans, via first class regular U.S. mail:
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25 AFFIDAVIT OF SERVICE— PAGE 1 OF 2
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4 I certify under penalty of perjury under the laws of the State of Washington that
5 the foregoing is true and correct.

6 

7 CHRISTINA K. ALLEN
8 Legal Assistant to
9 Mark E. Hurdelbrink, #25223
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